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HEW KUAN YAU v. MENTERI DALAM NEGERI & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[JUDICIAL REVIEW NO: WA-25-531-11-2019]
24 JUNE 2021

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ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application for – Application to quash decision of Minister of Home Affairs ('Minister') – Minister issued prohibitory order and banned book ('decision') – Whether decision reasonable/rational – Whether there was sufficient evidence to show that book likely to be prejudicial to public order, security or alarm public opinion – Whether decision bias, made in bad faith and disproportionate – Whether there was actual harm or damage caused to anyone during circulation of book – Whether there was denial of right to be heard – Whether s. 7(1) of Printing Presses and Publications Act 1984 constitutional*

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CONSTITUTIONAL LAW: *Constitution – Constitutionality – Application to quash decision of Minister of Home Affairs ('Minister') – Minister issued prohibitory order and banned book ('decision') – Whether decision reasonable/rational – Whether there was breach of natural justice – Whether there was denial of right to be heard – Whether s. 7(1) of Printing Presses and Publications Act 1984 constitutional – Federal Constitution, arts. 5, 8 & 10*

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This was a judicial review application filed by the applicant to challenge the decision of the first respondent, the Minister of Home Affairs ('Minister'), in issuing a prohibitory order ('PO') banning the book entitled 'Belt and Road Initiative for Win-Winism' ('book'), authored by the applicant. The book was published in English, Malay and Chinese and the PO was issued against all three versions ('decision') and following the PO, the second respondent confiscated the book throughout the country. The applicant sought for an order of *certiorari* to quash the said decision. It was the applicant's case that (i) the decision in issuing the PO was unreasonable and/or irrational to the extent that no ordinary person could make the decision; (ii) the publication did not seek to promote communism or socialism but focused on the 'Belt and Road Initiative' and the background of the relationship between Malaysia and China and, as such, could not fall within the ambit of s. 7(1) of the Printing Presses and Publications Act 1984 ('Act') for being likely to be prejudicial to public order, security or alarm the public opinion; (iii) there was insufficient evidence and/or no evidence at all to show that the book was in the form of a comic was likely to be prejudicial to public order, security or alarm the public opinion; (iv) the decision was bias, made in bad faith and disproportionate. As a result of the PO, the applicant suffered severe damages to his reputation and was vilified by the public and media and viewed as a

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criminal; (v) there was no actual harm or damage caused to anyone during the circulation of the book; (vi) the PO failed to adhere to the principles of natural justice *ie*, the right to be heard '*audi alteram partem*', rendering the respondent's decision illegal. There was no initiative to seek clarification or justification from him; (vii) section 7(1) of the Act was unconstitutional for the manner it was worded as the provision gave absolute discretion to the first respondent in his decision-making process. The first respondent was said to be deemed to be the judge and the legislator when he decided whether a publication should be allowed for circulation in Malaysia. The court retained the power to review the decision; and (viii) section 7(1) of the Act restricted the freedom of speech and expression guaranteed by art. 10(1) of the Federal Constitution ('FC') and such restriction must fall within the grounds provided in art. 10(2)(a) of the FC. The respondents, on the other hand, took the position that (i) in exercising the power given under s. 7(1) of the Act, the Minister had taken a proactive step in issuing the PO. The Minister had scrutinised the book in arriving at his decision that the book was likely to be prejudicial or had the potential to disrupt public order. There were sufficient available materials duly considered by the Minister in discharging his function and statutory power under the Act; and (ii) there was no procedural requirement for the applicant to be given the right to be heard. It could not be said that the right of the applicant guaranteed under the FC had been infringed as the constitutional right was not absolute. Section 7(1) of the Act was constitutional and did not transgress the constitutional guarantee under the FC as the provision was legislated pursuant to art. 10(2)(a) of the FC.

Held (dismissing application):

(1) The PO was issued by the Minister pursuant to s. 7(1) under Part IV of the Act. It could not be disputed that by virtue of sub-s. 7(1) of the Act, after being satisfied that the contents of the book is in any manner prejudicial to or likely to be prejudicial to public order or which is likely to alarm public opinion, or is otherwise prejudicial to or is likely to be prejudicial to public or national interests, the Minister is given an absolute discretion to issue the PO prohibiting the publication of the book. As such, the Minister could not be said to have been guilty of an error of law in his action as he had exercised the power which in law he possessed. (paras 18 & 19)

(2) The decision of the Minister in issuing the PO against the publication of the book could not be said to be unreasonable on the ground that the book came in the form of a comic since the provision of s. 7(1) of the Act covers prohibition of publication in the form of caricature. (para 22)

(3) In the context of the facts, testing the exercise of the Minister's discretion on these facts objectively and, bearing in mind the primacy that should be placed on fundamental rights, there were some evidential bases before and facts available to the Minister that the book was likely to be prejudicial to public order and likely prejudicial to public interest and had in fact alarmed public opinion. Before the Minister, there was clear evidence of dissatisfaction and debates mounted by the public *via* social media. The police reports spoke volumes of the dissatisfaction amongst the people in regards to the publication of the book. The contents could trigger serious racial tensions and discords amongst the society, which could not be allowed to happen or explode in our multi-racial country. (para 28)

(4) Based on the facts and circumstances confronting the Minister at the material time, it could not be gainsaid that (i) the Minister acted irrationally or unreasonably on being satisfied that the book was likely to be prejudicial to public order, likely to alarm public opinion and likely to be prejudicial to public interest; and (ii) the statements made and the police reports lodged by the public were personal sentiments and political opinions and differences. Unrest and ill feelings within the community had surfaced *via* the comments, media statements and police reports lodged at the material time. (para 30)

(5) Since the Act did not provide the right to be heard before any order made pursuant to sub-s. 7(1) of the Act, the principle of natural justice could be gainsaid to have been breached. Parliament found it appropriate to restrict the right to be heard when the Act was enacted in the interest of the security of the Federation and public order. If there was no such procedural requirement, then there could not be non-compliance. The court could not supplement the legislation and it was not for the courts to create procedural requirements because it was not the function of the courts to make laws or rules. Sub-section 7(1) of the Act must be given its legislative effect. The applicant's contention, that the denial of his right to be heard contravened arts. 5(1) and 8(1) of the FC and the restriction of such right as provided by sub-s. 7(1) of the Act was not allowed by virtue of art. 10(2) and (4) of the FC, was untenable. The rights prescribed by the FC were not absolute. The rights enshrined in art. 5(1) of the FC could be taken away save in accordance with the law. It was pertinent to stress that liberty of person prescribed in art. 5 of the FC does not include the right to be heard in the Minister's decision-making process pursuant to s. 7(1) of the Act. (paras 37-39)

(6) Article 10 of the FC itself provides for the restriction to be imposed on the rights conferred in para (1) of cl. (1) when it is necessary or expedient in the interest of the security of the Federation. The requirements of the

standards of 'illegality', 'procedural impropriety', 'irrationality' or 'proportionality' have not been satisfied to quash the Minister's decision. The limitation on the fundamental right conferred under art. 10 of the FC was necessary and the interference by the Minister was proportionate to the legitimate aim being pursued. Sub-section 7(1) of the Act was constitutional and the decision of the Minister in issuing the order was reasonable, legal and ought not to be disturbed by the court. (paras 42 & 45)

Case(s) referred to:

AK Gopalan v. State AIR 1950 SC 27 ***(refd)***

Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors [2013] 1 LNS 296 CA ***(refd)***

Collector and District Magistrate v. S Sultan AIR 2008 SC 2096 ***(refd)***

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1985] 1 AC 374 ***(refd)***

Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300 FC ***(refd)***

Government of Malaysia & Ors v. Loh Wai Kong [1979] 1 LNS 22 FC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur [2013] 1 CLJ (Sya) 261 CA ***(refd)***

Mohd Faizal Musa v. Menteri Keselamatan Dalam Negeri [2018] 9 CLJ 496 CA ***(refd)***

Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors [2011] 9 CLJ 50 CA ***(refd)***

Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(refd)***

PP v. Ooi Kee Saik & Ors [1971] 1 LNS 113 HC ***(refd)***

S Rangarajan v. P Jhagivan Ram & Ors 1989 2 SCC 574 ***(refd)***

Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor And Another Appeal [2015] 2 CLJ 328 CA ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 5(1), 8(1), 10(1), (2)(a), (4)

Immigration Act 1959/63, s. 59

Printing Presses and Publications Act 1984, s. 7(1)

For the applicant - Shamseh Jeevaretnam, Vince Tan & Kelly Yap Jia Sin; M/s Jeeva Partnership

For the respondent - Ahmad Hanir Hambaly; SFC & Ng Wee Li; FC

Reported by Lina E

JUDGMENT

Noorin Badaruddin J:

[1] This is a judicial review application filed by the applicant to challenge the decision made by the first respondent in issuing a prohibitory order ("PO") dated 23 October 2019 banning the book authored by the applicant.

The applicant seeks for an order of *certiorari* to quash the first respondent's decision in issuing the PO as contained in the Federal *Gazette* P.U (A) 288/2019 together with other prayers stated in encl. 1.

Brief Facts

[2] The applicant is the author of the book entitled "Belt and Road Initiative for Win-Winism" (hereinafter referred to as the "book"). The book was published in three different languages namely English, Malay and Chinese.

[3] On 23 October 2019 the PO was issued by the first respondent contained in the Federal *Gazette* P.U (A) 288/2019 dated 23 October 2019 against the three versions of the book ("the decision"). Following the PO, the second respondent had confiscated the book throughout the country. Aggrieved by the decision of the first respondent (hereinafter referred to as the "Minister"), the applicant filed the present application.

Summary Of The Applicant's Contentions

[4] In his executive summary filed herein, the applicant contends as follows.

[5] It is the applicant's case that the Minister's decision in issuing the PO is unreasonable and/or irrational. It is contended that the decision is unreasonable to the extent that no ordinary person could make the same decision as the Minister. According to the applicant, the publication of the book does not seek to promote communism or socialism but focuses on the Belt and Road Initiative and the background of the relationship between Malaysia and China. As such, it is argued that this cannot fall within the ambit of s. 7(1) of the Printing Presses and Publications Act 1984 ("the Act") for being likely to be prejudicial to public order, security or alarm the public opinion.

[6] It is argued that there is insufficient evidence and/or no evidence at all to show that the book in the form of a comic is likely to be prejudicial to public order, security or alarm the public opinion. The Minister's decision is said to be bias and is made in bad faith as the evidence relied by him to come to the decision is unilateral and again, bias.

[7] It is argued that there was no actual harm or damage caused to anyone during the circulation of the book and that the whole saga was political in nature in a bid to discredit the applicant and to link him to his former political party, DAP, using the narrative of race and religion.

[8] The applicant further contends that the decision by the Minister is disproportionate. According to the applicant, as a result of the PO, he had suffered severe damages to his reputation and was vilified by the public and media and viewed as criminal. Due to the public outcry and backlash, which

the applicant stated to be politically motivated, he had to resign from the position of CEO at the Malaysia-China Business Council (MCBC) and suffered loss of income and opportunities in terms of his corporate career. In addition, his reputation is said to be wrongfully tarnished by his critics both in public and private.

[9] It is submitted that the PO failed to adhere to the principles of natural justice ie, the right to be heard "*audi alteram partem*" rendering the first respondent's decision illegal. The applicant argued that there was no initiative to seek clarification or justification from him before the PO was issued and that the police investigation was still ongoing on the day the PO was issued. There were two letters sent by the applicant to the first respondent objecting to the said PO but he received no reply. According to the applicant he is bereft of the right to be heard and denied of the constitutionally guaranteed procedural fairness as the first respondent had failed to consider his two appeal letters or even seek explanation from him who had been adversely affected by the decision.

[10] On behalf of the applicant, it is submitted that s. 7(1) of the Act is unconstitutional for the manner it is worded as the provision gives the absolute discretion to the first respondent in his decision-making process. The first respondent is said to be deemed to be the judge and legislator when he decides whether a publication should be allowed for circulation in Malaysia. It is submitted that it is the court that retains the power to review the Minister's decision.

[11] The provision of s. 7(1) of the Act is argued to restrict freedom of speech and expression guaranteed by art. 10(1) of the Federal Constitution and such restriction must fall within the grounds provided in art. 10(2)(a) of the Federal Constitution. It is the applicant's contention that the decision falls short of the reasonable test as enumerated in the case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333 and *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2011] 9 CLJ 50; [2011] 6 MLJ 507 and ought to be struck down as unconstitutional.

Summary Of The Respondents' Contentions

[12] The respondents take the position that in exercising the power given under s. 7(1) of the Act, the Minister had taken a proactive step in issuing the PO. It is argued that the Minister had scrutinised the book in arriving to his decision that the book is likely to be prejudicial or has the potential to disrupt public order. It is argued that there were sufficient available materials before the Minister and duly considered by him in discharging his function and statutory power under the Act and as such there is no plausible reason for the court to interfere with the decision.

[13] It is further argued that there is no procedural requirement for the applicant to be given the right to be heard. It cannot be said that the right of the applicant guaranteed under the Federal Constitution has been infringed as the constitutional right is not absolute. It is submitted that s. 7(1) of the Act is constitutional and does not transgress the constitutional guarantee under the Federal Constitution as the provision is legislated pursuant to art. 10(2)(a) of the Federal Constitution. It is concluded that the decision of the Minister is reasonable, legal and ought not to be disturbed.

Findings

[14] The grounds on which an administrative action is subject to control by judicial review had been classified under three heads, namely illegality, irrationality and procedural impropriety. In the landmark case of *Council of Civil Service Unions v. Minister For the Civil Service* [1985] AC 374 apart from the three headings, the principle of "proportionality" had also been adopted under the classification for judicial review. In general, in exercising its supervisory power in judicial review, the court is to determine whether the law is being obeyed or otherwise by the decision-making authority in question. So long as the decision is reached in accordance with law, the general rule is that the court's own view on the correctness of such decision is outside the province of judicial review. In addition, the court is reminded that its power to interfere in matters relating to the exercise of discretion by the Minister or a public authority is not an appellate authority to override the decision but as a judicial authority to see whether the Minister or a public authority has contravened the law.

[15] The applicant herein contends that the PO made pursuant to s. 7(1) of the Act is unreasonable and irrational. The applicant has averred that the book is purely a comic book and does not promote any political ideology specifically communism and socialism. It is averred that unlike a scholarly literature, a comic book like the book herein, would not be able to explain in-depth political ideology. According to the applicant, a comic book is a form of entertainment and not a mode for dissemination of an ideology. The applicant further denied that the book disseminates wrong and confusing facts relating to communism nor does it contain any element to arouse support and sympathy to communism. The applicant stressed that the book is premised upon the "Belt and Road Initiative"; a strategy spearheaded by the People's Republic of China that seeks to connect Asia with Africa and Europe *via* land and maritime networks with the aim of improving regional integration, increasing trade and stimulating economic growth. The book is said to contain facts and affirmation based on scholarly materials. The applicant denied that the contents of the book could raise doubts as to the country's history and does not question the struggle of the national figures in fighting for the independence and development of the country.

[16] The applicant highlighted that on 25 April 2019 the then Prime Minister of Malaysia, Tun Dr Mahathir Mohamad had in fact presented a copy of the book to the President of China during his visit to China and contends that if the book is likely to cause harm to public order, security and cause alarm to the public, it would certainly be banned from being brought to the House of Representative in Beijing, China. The book is averred to have obtained the unique numeric commercial/product book identifier *vide* the International Standards Book Number (ISBN) and had been presented to schools by Asia Comic Cultural Museum and it was up to the schools to place the book at the libraries.

[17] The applicant highlighted that from the time the book was published on 18 April 2019 to the date the PO was issued on 23 October 2019, no incidents detrimental to public order had occurred or that the book had alarmed the people's mind. Further, the applicant asserts that no figures are adduced to show the number of people who had read the book.

[18] The PO was issued by the Minister pursuant to s. 7(1) under Part IV of the Act which provides:

PART IV

CONTROL OF UNDESIRABLE PUBLICATIONS

Undesirable publications

7(1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the *Gazette* prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

[19] It cannot be disputed that the Minister by virtue of sub-s. 7(1) of the Act after being satisfied that the contents of the book is in any manner prejudicial to or likely to be prejudicial to public order or which is likely to alarm public opinion, or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, is given an absolute discretion to issue the PO dated and published in the *Gazette* of 23 October 2019 prohibiting the publication of the book. As such the Minister cannot be said to have been guilty of an error of law in his action as he had exercised the power which in law he possesses.

[20] According to the Minister, the book has aroused anger amongst the people in this country and must be contained forthwith to avoid unwanted incident from happening. Further, the Minister avers that the contents of the book failed to take into account the sensitivity of the multi-racial and multi-religious of the society and that it might divide the unity and harmony of the society in this country. The relevant averments by the Minister in his affidavit as to the reasons of his decision in issuing the PO is reproduced. The Minister avers as follows:

> 9. Selanjutnya, saya menegaskan seperti yang berikut:
>
> 9.1 …
>
> 9.2 …
>
> 9.3 Perkara utama yang saya pertimbangkan apabila mengeluarkan Perintah Larangan adalah penerbitan buku tersebut mempunyai isi kandungan yang mungkin memudaratkan ketenteraman awam, mungkin menggemparkan fikiran orang ramai dan mungkin memudaratkan kepentingan awam;
>
> 9.4 Kandungan buku tersebut telah membangkitkan kemarahan rakyat Malaysia dan perlu dibendung dengan segera bagi mengelakkan insiden yang tidak diingini daripada berlaku;
>
> 9.5 Walaupun penerbitan tersebut adalah berbentuk komik, namun isi kandungan buku tersebut membawa mesej yang boleh memudaratkan kepentingan awam, menggemparkan fikiran orang ramai dan memudaratkan ketenteraman awam;
>
> 9.6 Komik merupakan instrument penerbitan yang mudah menarik minat golongan muda
>
> 9.7 Perintah Larangan tersebut perlu dikeluarkan memandangkan buku tersebut telah diedarkan ke sekolah;
>
> 9.8 Pengedaran buku ini ke sekolah adalah amat tidak sesuai memandangkan kandungannya terlalu mengagungkan Negara China. Secara tidak langsung, kandungan buku ini akan menjejaskan semangat cintakan Negara di kalangan pelajar sekolah;
>
> 9.9 Kandungan buku tersebut secara amnya cuba mempromosikan ideologi komunisme dan sosialisme, menyebarkan fakta yang salah dan mengelirukan tentang komunis serta mengandungi unsur membangkitkan sokongan dan simpati terhadap perjuangan komunis;
>
> 9.10 Buku tersebut juga telah menimbulkan keraguan kepada pembaca khususnya golongan muda tentang sejarah Malaysia, dan mempertikaikan usaha serta perjuangan pemimpin terdahulu dalam memperjuangkan kemerdekaan dan pembangunan Negara; dan
>
> 9.11 Kandungan buku tersebut tidak mengambil kira sensitiviti rakyat Malaysia yang berbilang kaum dan agama serta dibimbangi boleh memecahbelahkan keharmonian dan perpaduan masyarakat di Negara ini.

[21] The Minister in his affidavit in reply had stated that the book in the form of a comic could easily attract the interest of the younger generation and opined that the contents of the book contained messages that could be prejudicial to public order. The Court of Appeal in the case of *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor Appeal* [2015] 2 CLJ 328 had recognised that publication in the form of cartoons can have negative effect. Mohamad Ariff Yusof JCA (as he then was) in that case stated at p. 354 of the report as follows:

> [53] What is the subject matter and context of the present appeals? We are not dealing with serious and sober works of literature in written prose. We are instead dealing with cartoons, political cartoons, satire and parody. To start with, can cartoons *per se* and as a rule, have a tendency to disrupt public order? This special genre of literary and artistic work have special characteristics which sets it apart from written prose. No reasonable person will read a cartoon with the same concentration, contemplation and seriousness as one would when reading a work of literature. Cartoons exaggerate, satirise and parody life, including political life. When read (more likely, glanced through), they would tickle the ribs, perhaps evoke a chuckle, and makes one reflect for a momentary instance the humorous side of life. Quite often the reader is drawn to it by its incisive wit. The political cartoonist, unlike the serious political pamphleteer, seeks to ridicule persons and institutions with humour to deliver a message. It will be most exceptional if a political cartoon will have the effect of disrupting public order, security or the safety of a nation. **This is not to say that cartoons cannot have this negative effect. They can.**
>
> (emphasis added)

[22] Therefore, the decision of the Minister in issuing the PO against publication of the book cannot be said to be unreasonable on the ground that the book comes in the form of a comic since the provision of s. 7(1) of the Act covers prohibition of publication in the form of caricature.

[23] In testing the exercise of subjective discretion of the Minister against the objective facts in order to determine whether the discretion has been fairly and justly exercised, this court looks into the reasons laid down by the Minister in justifying the PO. Predominantly, what is to be determined herein is whether the contents of the book contain materials that is likely to be prejudicial to public order, or which is likely to alarm public opinion. The court is entitled to investigate the action of the Minister with a view to seeing whether the Minister has taken into account matters which it ought not to take into account, or conversely, has refused to take into account matters which he ought to take into account. (Lord Greene in the *Wednesbury* case). The Minister avers that he had scrutinised the book and found justifications for the reasons in issuing the PO as follows:

Muka surat 14

(i) Pemohon menyatakan disebabkan etnik dan isu agama, kebanyakan pemuda Melayu lebih prihatin kepada isu-isu semasa negara-negara Islam seperti Indonesia atau zon rantau timur-tengah. Walaubagaimanapun, terdapat segelintir daripada kamu Melayu turut mengikut ideologi-ideologi dari Eropah dan Amerika Syarikat atau dikenali sebagai pro-Barat tetapi merupakan golongan minority;

(ii) Pernyataan sebegini boleh menjurus kepada pertelingkahan antara kaum dengan melabelkan majoriti bangsa Melayu hanya prihatin kepada sesetengah isu dan hanya minority mengikuti ideologi Barat;

Muka surat 15

(iii) Pemohon menyatakan berdasarkan kajian yang dijalankan oleh Merdeka Centre for Opinion Research pada tahun 2018, didapati terdapat sebanyak 18.1% daripada rakyat Malaysia merupakan penyokong atau simpati kepada Jemaah Islamiah yang dikenali sebagai kumpulan ekstremis yang aktif di Asia Tenggara. Sebahagian daripada masyarakat Muslim di Filipina (15.7%), Indonesia (12.6%) dan Thailand (9.6%) turut menyokong kumpulan tersebut;

(iv) Pemohon juga menyatakan penduduk Melayu radikal yang prihatin tentang pelaksanaan dasar etnik di Xinjiang menyebabkan mereka mempunyai tanggapan yang negative terhadap China. Terutamanya dalam hal mengenai kerajaan China mengharamkan sekelompok minority Uighur yang terlibat dalam Gerakan pemisah yang telah mengancam perpaduan dan harmoni masyarakat;

(v) Gambar dengan pernyataan kesiannya Umat Islam ditindas oleh Kerajaan Komunis;

(vi) Pernyataan-pernyataan ini cuba menyebabkan sikap islamophobia di kalangan pembaca. Ini juga cuba menggambarkan rakyat Malaysia beragama Islam menyokong kepada Jemaah Islamiyah. Pemohon juga cuba mempertahankan keputusan Kerajaan China dalam mengharamkan minority Uighur dan melabelkan penduduk Melayu yang menentang penindasan Uighur sebagai radikal;

(vii) Karikatur seorang pemuda berkopiah, beserta karikatur Osama bin Laden dan seorang pejuang IS dengan pernyataan-pernyataan di muka surat 3 ini memberikan gambaran seolah-olah rakyat Islam di Malaysia ada yang menyokong perjuangan pengganas tersebut;

(viii) Pernyataan-pernyataan dan karikatur di muka surat 3 ini boleh menyebabkan ketegangan kaum yang serius;

Muka surat 16

(ix) Gambar-gambar dan pernyataan menunjukkan golongan generasi tua kaum Melayu mempunyai sentiment antikomunis disebabkan propaganda parti politik UMNO selama 5 dekad;

(x) Sentimen antikomunis menyebabkan masyarakat mempunyai prasangka dan salah faham terhadap Inisiatif Jalur dan Jalan (BRI);

(xi) Pernyataan-pernyataan ini cuba menunjukkan bahawa sentiment antikomunis merupakan perkara yang tidak betul;

Muka surat 17

(xii) Kaum India pula dinyatakan dipengaruhi negara asal mereka iaitu India mengenai pemahaman mereka terhadap kebangkitan Cina

(xiii) Hubungan Kerajaan India dan Kerajaan China agak rumit dan konflik tersebut mempengaruhi persepsi Kaum India terhadap BRI;

(xiv) Malaysia digambarkan seolah-olah tersepit antara konflik China dan India;

(xv) Gambar menunjukkan pemimpin China seorang yang mesra tapi pemimpin India pula dalam keadaan tidak selesa;

(xvi) Pernyataan-pernyataan ini menunjukkan seolah-olah ketiga-tiga buah Negara mempunyai hubungan yang tidak harmoni dan kaum India di Malaysia mempunyai persepsi yang negative terhadap Negara China;

Muka surat 18

(xvii) Digambarkan seolah-olah rakyat China, India dan Melayu mempunyai pandangan berbeza mengenai BRI;

Muka surat 20 hingga 30

(xviii) Mengagungkan Negara China dan ideologi sosialisme;

(xix) Rakyat Malaysia lebih biasa dengan American dream (m/s 18);

(xx) Kebanyakan orang ketagih kepada budaya barat dan menjadi sebahagian daripada kehidupan dan malah menganggap nilai-nilai tersebut sebagai nilai tamadun sejagat;

(xxi) Xenophobia merupakan fenomena yang biasa dalam Malaysia. Kebanyakan kaum Cina di Malaysia yang hanya bertutur Bahasa Inggeris dan tidak fasih Bahasa ibunda mereka akan menjadi golongan elit. Orang Cina yang hanya bertutur Bahasa Cina akan dipandang rendan dan digelar Cina Apek (p. 29);

Muka surat 110

(xxii) Pernyataan-pernyataan yang cuba menyebarkan ideologi sosialisme yang ternyata boleh menimbulkan ketegangan kaum dan tidak menghormati antara perkara asas dalam Perlembagaan Persekutuan mengenai kontrak social;

Muka surat 134

(xxiii) Pernyataan "500 tahun lalu Dinasti Ming bukan sahaja membawa kemakmuran kepada Melaka malah melindungi Melaka daripada ancaman Siam dan lanun."

(xxiv) Saya tidak menafikan manfaat hubungan di antara Kerajaan Melayu Melaka dengan Kerajaan China namun demikian kenyataan tersebut seolah-olah tidak mengambil kira fakta pencapaian Kerajaan Melayu Melaka sebelum menjalinkan hubungan dengan China;

Muka surat 135

(xxv) Pemohon menyatakan Tentera Jepun memerintah Malaya dengan rejim fasisme radikal, terutama terhadap komuniti Cina tempatan, yang menjadi mangsa kekejaman Jepun. Manakala terhadap orang Melayu, Jepun dikatakan mengambil pendekatan memujuk dengan slogan Asia untuk Orang Asia;

(xxvi) Pernyataan dan karikatur di muka surat ini menggambarkan seolah-olah masyarakat Melayu adalah lemah kerana hanya menjadi sasaran pujuk rayu askar Jepun sedangkan sejarah membuktikan bahawa orang Melayu telah bangkit menentang penjajahan Jepun;

Muka surat 136 hingga 137

(xxvii) Pernyataan-pernyataan di muka surat ini menggambarkan seolah-olah pergerakan anti-Jepun hanya terdiri daripada penduduk Cina tempatan;

(xxviii) Memaparkan karikatur orang Cina menentang penjajahan British setelah pemerintahan Jepun dan pengisytiharan darurat oleh British dengan menempatkan semua orang Cina ke kampong baru yang dipagar dengan wayar besi;

(xxix) Penempatan semula di bawah Rancangan Briggs adalah bertujuan untuk menyekat sokongan kepada gerila komunis yang masih melakukan penentangan bersenjata selepas Jepun menyerah kalah. Semasa penjajahan Jepun, kebanyakan orang cina tinggal di merata tempat. Namun penempatan semula tersebut telah mewujudkan lebih kurang 550 buah kampong baru;

(xxx) Gambar dan karikatur kampong baru tersebut dikelilingi wayar besi seolah-olah menunjukkan penindasan terhadap kaum Cina merupakan suatu penyelewengan fakta sejarah;

Muka surat 138

(xxxi) Karikatur Tunku Abdul Rahman yang berpeluh dengan menyatakan kita antikomunis cuba menggambarkan seolah-olah Tunku seorang yang lemah dan dipaksa menyatakan pendirian tersebut atas tekanan pihak British;

(xxxii) Pernyataan bahawa British terpaksa menyerahkan kuasa pentadbiran kepada parti politik sayap kanan atau golongan elit seolah-olah cuba menggambarkan bahawa pemimpin tempatan pada masa tersebut didominasi oleh golongan atasan. Namun hakikatnya ramai pejuang kemerdekaan daripada pelbagai lapisan masyarakat telah berganding bahu memperjuangkan kemerdekaan Negara pada masa tersebut;

Muka surat 139

(xxxiii) Terdapat segelintir kaum Cina yang tidak menyokong pembentukan pakatan Kerajaan, sama ada menjadi ahli Parti Komunis Cina, atau ahli Parti Buruh Malaya. Kebanyakan mereka turut menjadi mangsa semasa kawalan rusuhan. Mereka telah dimasuk ke dalam penjara dan terpaksa dipisahkan daripada keluarga. Orang Cina yang menentang pakatan tersebut telah menderita pada tahun 60an dan 70an.

(xxxiv) Pernyataan ini adalah satu penyelewengan fakta sejarah yang boleh mencetuskan sentiment pertelingkahan antara kaum. Hakikatnya pada masa tersebut pihak berkuasa hanya memburu komunis yang masih melakukan pemberontakan bersenjata walaupun Negara telah mencapai kemerdekaan;

Muka surat 142

(xxxv) "DAP disokong oleh agama Kristian! Jadi mengundi kerajaan baru akan mengakibatkan orang Kristian menjajah Muslim." Dengan karikatur seorang penceramah beragama Islam;

(xxxvi) Sekiranya benar pengataan dikatakan oleh seorang pemimpin, perkara sebegini tidak wajar disebarkan lagi kerana boleh mengundang kepada perpecahan di kalangan masyarakat. Tambahan lagi, buku ini telah diedarkan di sekolah;

Muka surat 147

(xxxvii) Pernyataan "Rakyat Malaysia akhirnya menolak 61 tahun rejim otoritarian dan harapan yang baru kepada demokrasi" menggambarkan seolah-olah Malaysia sejak kemerdekaan ditadbir tanpa proses demokrasi dan menidakkan proses pilihanraya di Negara ini; dan

A (xxxviii) Pernyataan sebegini amat tidak sesuai terutamanya kepada golongan muda kerana ianya menidakkan jasa pemimpin-pemimpin terdahulu sejak kemerdekaan.

[24] According to the Minister, apart from examining the book, its publication and circulation had triggered conflicts amongst the public. The B Minister substantiated his decision by referring to 81 police reports lodged by the public, the response and statements made by the public through the social media relating to the publication and circulation of the book. The materials in the forms of comments made by the public were gathered and shown to the Minister after investigation was conducted by the Enforcement C Department of his Ministry. The Minister avers as follows:

> 11. Selain perkara-perkara yang dinyatakan di atas, saya juga telah meneliti buku tersebut secara keseluruhannya dan mendapati kandungan buku tersebut mungkin memudaratkan ketenteraman awam, mungkin menggemparkan fikiran orang ramai dan mungkin memudaratkan kepentingan awam, saya telah mengeluarkan Perintah Larang tersebut. D Sesalinan buku tersebut dilampirkan di sini dan ditandakan sebagai "Ekshibit "M-1".
>
> 12. Saya juga menegaskan bahawa penerbitan dan pengedaran buku ini telah mencetuskan konflik di kalangan rakyat. Pelbagai ketidakpuasanhatian di kalangan rakyat telah disuarakan di media social. E Bahagian Penguatkuasaan dan Kawalan Kementerian Dalam Negeri telah menjalankan penyiasatan terhadap perkara ini telah mengemukakan kepada saya komen-komen daripada rakyat mengenai buku tersebut. Setelah Perintah Larangan tersebut dikeluarkan masih terdapat komen-komen mengenai buku tersebut di media social. Bersama-sama ini dikemukakan sesalinan komen-komen tersebut dan ditanda sebagai F Ekshibit "M2".
>
> 13. Selain itu saya juga dimaklumkan dan dirujuk dengan 81 laporan polis yang dibuat terhadap penerbitan dan pengedaran buku tersebut. Saya difahamkan pihak polis masih menyiasat laporan polis yang telah dibuat. Bersama-sama ini disertakan beberapa laporan polis tersebut dan ditanda G sebagai Ekshibit "M3".
>
> 14. Saya juga menyatakan penerbitan dan pengedaran buku ini telah menjadi isu hangat dan pelbagai kenyataan media telah dibuat baik daripada pemimpin dan kumpulan NGO. Bersama-sama ini disertakan sesalinan keratan media yang menunjukkan pernyataan-pernyataan yang H dibuat berkenaan buku ini dan ditanda sebagai Ekshibt "M-4".
>
> 15. Saya juga menegaskan bahawa buku tersebut mengandungi fakta yang mengelirukan dan rujukan kepada peristiwa sejarah yang dinyatakan dalam buku tersebut tidak disokong dengan sebarang bukti dan pengesahan dan bertentangan sejarah yang sebenar.

I

[25] Although no incident that is prejudicial to public order or security had actually happened from the time the book was published until the time the PO was issued, the Minister was of the opinion that the book is likely to be prejudicial to public order, security or which is likely to alarm public opinion.

[26] In addition, the Minister has also averred the followings:

> 18. Saya juga menegaskan bahawa YAB Perdana Menteri melalui siaran akhbar pada 18.10.2019 telah menyatakan bahawa buku tersebut bukan hadiah rasmi yang diberikan kepada Presiden Xi Jinping semasa pertemuan dua hala di Forum Jalur dan Laluan untuk Kerjasama Antarabangsa Ke-2.
>
> 19. Pejabat Perdana Menteri juga telah menyatakan bahawa buku tersebut telah dibawa tanpa melalui prosedur dan saluran yang betul. YAB Perdana Menteri juga tidak pernah terlibat dalam penerbitan buku tersebut atau mengetahui isi kandungannya. Selain itu Perdana Menteri juga tidak pernah memberikan persetujuan agar gambar beliau digunapakai untuk apa-apa tujuan atau memberi keterangan agar komik tersebut diedarkan di sekolah. Sesalinan Kenyataan Akhbar Pejabat Perdana Menteri bertarikh 18.10.2029 dilampirkan sebagai Ekshibit "M-5".
>
> 20. Walaupun buku tersebut telah mematuhi International Standards Book Number (ISBN), namun saya menegaskan ia diperoleh tanpa memerlukan persetujuan Kementerian Dalam Negeri. ISBN hanya bertujuan untuk mengenal pasti buku tersebut, edisi, penerbit dan ciri-ciri lain buku tersebut. Saya menegaskan ISBN bukanlah kelulusan oleh Kementerian Dalam Negeri untuk penerbitan dan pengedaran buku tersebut.

[27] In reply, the applicant, in summary, denied all the averments made by the Minister and stated that he is entitled to give his view as an academician with a degree in history and as someone who is able to give his historical worldview through the book. The applicant avers that in so far as the police reports and social media statements made by the public and relied upon by the Minister in making his decision are concerned, they are all political ploy against him as a former DAP member, executed by the "deep state" which had brought about the downfall of the Pakatan Harapan Government.

[28] In the context of the facts herein, testing the exercise of the Minister's discretion on these facts objectively, and bearing in mind the primacy that should be placed on fundamental rights, this court finds that there are some evidential bases before and facts available to the Minister that the book is likely to be prejudicial to public order and likely prejudicial to public interest and had in fact alarmed public opinion. This court finds that before the Minister, there were clear evidence of dissatisfaction and debates mounted by the public *via* the social media. The police reports speak volumes of the

dissatisfaction amongst the people in regards to the publication of the book notwithstanding their political allies as alleged by the applicant. The Minister had earlier affirmed that he had examined the book and found pages with contents that could trigger serious racial tensions and discords amongst the society. Racial tension is likely to be prejudicial to public order. In our multi-racial country, racial tension and discord cannot be allowed to happen or explode. The true test herein is not the kind, but the potentiality of the act in question. The Court of Appeal in *Mohd Faizal Musa v. Menteri Keselamatan Dalam Negeri* [2018] 9 CLJ 496 had stated that:

> … If it is prejudicial to public order, then it must be shown the existence of the actual public disorder. But if it is "likely to be prejudicial to public order". As in the instant case, then it would cover anything which has the potential to disrupt public order.

[29] Further, in issuing the PO, the Minister must have anticipated the danger arising from the likelihood of serious racial tensions and discords amongst the society. The anticipated danger cannot be said to be remote, conjectural or far-fetched as it is evident from the response *vide* the social media and police reports lodged by the public. In *S Rangarajan v. P Jhagivan Ram & Ors* 1989 2 SCC 574, the Indian Supreme Court had stated:

> Court's commitment to freedom of expression demands that it cannot be suppressed unless the situation created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. It should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg'.

[30] It is of the considered view that based on the facts and circumstances confronting the Minister at the material time, it cannot be gainsaid that the Minister had acted irrationally or unreasonably on being satisfied that the book is likely to be prejudicial to public order, likely to alarm public opinion and likely to be prejudicial to public interest. It cannot be said the statements made and the police reports lodged by the public are personal sentiments and political opinion and differences. Unrest and ill-feeling within the community that may lead to a disruption of the even tempo of the community has surfaced *via* the comments, media statements and police reports lodged at the material time. In *Darma Suria Risman Saleh v. Menteri Dalam Negeri Malaysia & Ors* [2010] 1 CLJ 300, the Federal Court speaking through the judgment of Gopal Sri Ram FCJ (as he then was) had held that "an act is prejudicial to public order if it disrupts or has the potential to disrupt safety and tranquility".

[31] According to the Federal Court in *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 1 CLJ (Sya) 261, potential disruption of the even tempo of the community is a basis to restrict the fundamental liberties of freedom of expression. It is so when any particular activity comes within the scope of being prejudicial to public order. The Federal Court had cited the Indian Supreme Court case of *Collector and District Magistrate v. S Sultan* AIR 2008 SC 2096, where Dr Arjit Pasayat J wrote amongst others that:

> … The distinction between the areas of "law and order" and "public order" is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order.

[32] The Federal Court in *Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* (*supra*) had also quoted the passage from Professor MP Jain "*Administrative Law of Malaysia and Singapore*, 3rd edn where the learned author stated that in exercising discretionary power, some measures of personal judgment would be involved and the court's reluctance to interfere with the exercise of personal judgment as a matter of principle is well documented in the case law particularly when it concerns national security or public order. The Federal Court stated as follows:

> *[94] Professor MP Jain in the passage cited earlier had said that an exercise of a discretionary power involves an exercise of some measures of personal judgment. The reluctance on the part of court of law to interfere with this exercise of personal judgment, as matter of principle, is well documented in the case law particularly so where it concerns national security or public order or simply on a question of policy.* For example, in *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] 1 AC 374, Lord Fraser said at p. 402 para. C that:
>
> > *... The decision whether the requirements of national security out-weight the duty to of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security.*
>
> [95] The subjective satisfaction test as to matters of national security or public order or policy, hence the reluctance to interfere with the exercise of discretion on those matters has also been accepted by our courts – see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 1 LNS 65; [1969] 2 MLJ 129, *Kerajaan Malaysia & Ors v. Nasharuddin Nasir* [2004] 1 CLJ 81. *The primary reason for this approach is that the Government alone has access to the necessary information to form an opinion whether such matters are matters of national security or public order. It is the responsibility of the Government to formulate policy for the safety of the public.* It was said in *Liversidge v. Sir John Anderson & Anor* [1942] AC 206 at p. 253 that "a decision on this question can manifestly be taken by one who has

A both knowledge and responsibility which no court can share." Suffian FJ in *Karam Singh* (*supra*) accepted the argument and reasoning that when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent B to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to a representation. He went further to say that 'in making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact'. In *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 1 LNS 296; [2013] 5 MLJ 174, my learned C brother Justice Mohamed Apandi Ali JCA (now FCJ) had the occasion of discussing the exercise of the appellant's power under s. 7 of the Act 301 to prohibit the printing, importation, production etc of any publication which contains materials prejudicial or likely to be prejudicial to public order and concluded that the test to the exercise of such power is a D subjective satisfaction of the first appellant. The power, he said, is without doubt a subjective discretionary power of the Minister. *Case law also has shown that in exercising this discretionary power and subjective satisfaction, the first appellant may also take into consideration whether the act or the publication that is to be regulated has the potential to disrupt the even tempo of the life of the community that it would prejudice public order, public safety and tranquillity.* The E first appellant consideration is not limited or confined to actual disruption of public order or tranquillity – see *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300; *PP v. Khong Teng Khen & Anor* [1976] 1 LNS 100; [1976] 2 MLJ 166, 177. In other words the first appellant, *as the Minister in charge of home security and public order need not wait for violence to break out before exercising his discretion to prevent such violence that* F *likely to lead to lawlessness and public disorder.* (emphasis added)

[33] The court is aware that the exercise of the Ministerial discretion under s. 7 of the Act affected a citizen's freedom of expression under the Constitution. As stated by Mohamed Ariff Yusof JCA in *Sepakat Efektif Sdn Bhd v. Menteri Dalam Negeri & Anor and Another Appeal* (*supra*), "Where an G exercise of discretion has a constitutional dimension, it is incumbent on the court to examine that exercise more vigilantly, and not rely solely on the *ipse dixit* of the Minister."

[34] In balancing between the discretion exercised by the Minister and the requirement of public order with that of the interest and freedom of the H applicant herein, this court is of the considered view that more weight must be afforded to the views of the Executive on matters of public order. Being a Minister in charge of the Home Affairs and Internal Security, public order and safety must be his primary concern. This court finds that the Minister had considered the potential harm to public order that may result in discord I amongst the multi-racial and multi-religious society of this country arising. It cannot be said that the decision arrived at by the Minister is so outrageous

in its defiance of logic that no sensible person who had applied his mind to the question decided upon could have arrived at it (*Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1985] 1 AC 374).

[35] Potential disruption of the even tempo of the community is a lawful basis to restrict the fundamental liberties of freedom of expression (*Menteri Dalam Negeri & Ors v. Titular Roman Catholic Archbishop of Kuala Lumpur* (*supra*)). The rights prescribed by the Federal Constitution are not absolute. That is true in the sense that the constitution of this country is unique and cannot be compared with other countries. With the multi-racial and multi-religious backdrop of this country, freedom of speech if not curtailed would have the potential to bring about untoward situation. Ultimately, the objective of curtailing the freedom would assist in maintaining public order and unity. Thus, if the Legislature had addressed itself to the question whether an opportunity should be afforded to the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by the legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme (Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525).

[36] After going through the book, even if the court is of the different view with the Minister's evaluation and decision, the court is reminded time and time again that it should not substitute what it thinks is the correct decision. What the court is concerned with is not the decision but the decision-making process. It does not entail the court substituting its discretion for that of the decision-maker. The Government has a right to preserve public peace and order.

[37] Since the Act does not provide the right to be heard before any order made pursuant to sub-s. 7(1) of the Act, the principle of natural justice cannot be gainsaid to have been breached. Parliament has found it appropriate to restrict the right to be heard when the Act is enacted in the interest of the security of the Federation and public order. If there is no such procedural requirement then there cannot be non-compliance thereof. The court cannot supplement the legislation and it is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. Subsection 7(1) of the Act must be given its legislative effect. In the case of *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* (*supra*) the Federal Court in support of its view as to giving legislative effect to relevant provisions of the Chapter D of the Public Officers (Conduct and Discipline) 1980 General Orders, stated as follows:

In this regard, we found support in the passage of the judgment of Barwick CJ in *Twist v. Randwick Municipal Council* [1976] 136 CLR 106 at p. 110:

> ... if the legislation has made provision for that opportunity to (be heard) to be given to the subject before his person or property is so affected, the court will not be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, *if the legislature has addressed itself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.*
> (emphasis added)

[38] The applicant's contention that the denial of his right to be heard contravenes arts. 5(1) and 8(1) of the Federal Constitution and the restriction of such right as provided by sub-s. 7(1) of the Act is not allowed by virtue of art. 10(2) (a) as well as art. 10(4) of the Federal Constitution is untenable. As stated earlier and at the risk of repetition, the rights prescribed by the Federal Constitution are not absolute. The rights enshrined in art. 5(1) of the Federal Constitution can be taken away save in accordance with law. This is clear from the provision of the said article which states:

> 5(1). No person shall be deprived of his life or personal liberty save in accordance with law.

[39] It is pertinent to stress that liberty of person prescribed in art. 5 of the Federal Constitution does not include the right to be heard in the Minister's decision-making process pursuant to sub-s. 7(1) of the Act. As such, the respondents cannot be said to have transgressed the applicant's liberty as prescribed by art. 5(1) of the Federal Constitution. In *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 1 LNS 22; [1979] 2 MLJ 33, Suffian LP (as he then was) in agreeing with what Mukherjee J had stated in *AK Gopalan v. State* AIR 1950 SC 27 relating to personal liberty quoted as follows:

> With respect we agree with what Mukherjee J said at p. 96 in *Gopalan* AIR 1950 SC 27:
>
> > In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification: *vide Dicey on Constitutional Law*, 9th edn., pp. 207, 208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty.

[40] In *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105, where the constitutionality of s. 59 of the Immigration Act 1959/63 was challenged on the basis that the exclusion of the right to be heard in that provision, before the cancellation of the respondent's entry permit was unconstitutional as it was said to have infringed the respondents' right to livelihood, the Federal Court had stated: A B

> It is clear from the authorities that the constitutional rights as guaranteed under art. 5(1) of the Federal Constitution can be taken away in accordance with law. Hence, s. 59 of the Act, which removes the *audi alteram partem* rule, which was duly enacted by Parliament is valid and constitutional.

C

[41] In regards to arts. 8(1) and 10(1) of the Federal Constitution as well as in considering the validity of sub-s. 7(1) of the Act, the Court of Appeal had stated in *Mohd Faizal Musa v. Menteri Keselamatan Dalam Negeri* (*supra*) as follows:

D

> [17] Article 8 of the Federal Constitution provides for equality before the law for all Malaysia citizens. While art. 10 allows the right to freedom of speech and expression. However, as rightly said by the learned High Court Judge and submitted by learned Senior Federal Counsel, the rights conferred under the articles are not absolute as under cl. 2 of art. 10, Parliament is empowered to restrict these rights through the provisions of the law and Act 301 is one of the laws enacted pursuant to that restriction which aims to limit freedom of expression, *inter alia*, in the interest of the security of the Federation and public order. Therefore the validity of the law ie, sub-s. 7(1), is not in question here. What is to be determined is whether, applying the factual matrix of the instant case, the order is validly made.

E F

[42] It must be borne in mind that art. 10 of the Federal Constitution itself provides for the restriction to be imposed on the rights conferred in para. (1) of cl. (1) when it is necessary or expedient in the interest of the security of the Federation. Article 10(2) stipulates as follows:

G

> (2) Parliament may by law impose:
>
> (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation or incitement to any offence.

H

[43] Raja Azlan Shah J (as the late Royal Highness then was) in *PP v. Ooi Kee Saik & Ors* [1971] 1 LNS 113; [1971] 2 MLJ 108 states:

I

A It is of course true, as a general statement, that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint. But as far as I am aware, no constitutional state has seriously attempted to translate the 'right' into an absolute right. B Restrictions are a necessary part of the 'right' and in many countries of the world freedom of speech and expression is, in spite of formal safeguards, seriously restricted in practice.

…

C *We must resist the tendency to regard right to freedom of speech as self-subsistent or absolute. The right to freedom of speech is simply the right which everyone has to say, write or publish what he pleases so long as he does not commit a breach of the law.*

…

D Whether such criticism is justified or not, is, in our system of Government, a matter upon which, in my opinion, Parliament and the people, and not the courts, should pass judgment. *Therefore, a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing* E *political and cultural institutions.* (emphasis added)

[44] In the case of *Arumugam Kalimuthu v. Menteri Keselamatan Dalam Negeri & Ors* [2013] 1 LNS 296; [2013] 5 MLJ 174, the Court of Appeal in its conclusion had touched on the jurisprudence that every right is correlated with a duty. The right to publish a book is stated to come within the liberty F enshrined in art. 10 of the Federal Constitution but subject to the restriction under art. 10(2) and such restrictions are those that will come into existence at the behest of Parliament which has a discretion to enact such law. The Court of Appeal stated:

[25] On this jurisprudence, it may be appropriate to refer to what was G observed by *Lord Steyn v. Home Secretary* [2001] 2 AC 523 at p 548, which reads as follows:

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary ion a democratic society, in the sense of meeting a pressing social need, and H the question whether the interference was really proportionate to the legitimate aim being pursued.

The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has I been a shift to merits review. On the contrary, as *Professor Jowell* [2000] PL

671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in *Mahmood* [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in *Mahmood*, at p 847, para 18, 'that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving Convention rights. In law context is everything.

[26] At the home scene, it seems that from the decision in *Dr Mohd Nasir Hashim v. Menteri* [2013] 5 MLJ 174 at 185 [2006] 6 MLJ 213 and and *Sivarasa Rasiah v. Badan Peguam* [2006] 1 MLJ 727, it is clear that Parliament can impose reasonable restrictions on the said 'freedom'.

[45] On the facts of the present application, this court is of the considered view that the requirements of the standards of 'illegality', 'procedural impropriety', 'irrationality' or 'proportionality' have not been satisfied to incline this court to quash the Minister's decision. On the facts of this case, the limitation on the fundamental right conferred under art. 10 is necessary and the interference by the Minister is proportionate to the legitimate aim being pursued. Subsection 7(1) of the Act is constitutional and the decision of the Minister/the first respondent in issuing the order is reasonable, legal and ought not be disturbed by the court.

Conclusion

[46] In the circumstances and premised on the reasons stated, this court finds no merit in the application. The application for judicial review was dismissed with costs of RM5,000.